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IN THE

Supreme Court of the United States

OCTOBER TERM—1961

No. ...544

ARTHUR H. SHAFFER and M. JAMES SPITZER,
Trustees,
Petitioners,

versus

C. GORDON ANDERSON, as Trustee in
Reorganization,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

ARTHUR H. SHAFFER and M. JAMES SPITZER, Trustees,
Petitioners,

v.

C. GORDON ANDERSON, as Trustee in Reorganization,
Respondent.

PETITION FOR WRIT OF CERTIORARI

Opinions Below

The opinion below is reported at 292 F. 2d 455 (App. 1a-11a).[1] No opinion was delivered in the District Court: the pertinent orders appealed from appear at R. 307-308, 324-326 and App. 13a, 18a.

Jurisdiction

The judgment of the Court of Appeals is dated and was entered July 7, 1961 (Tr. 544-556). By order dated August 18, 1961 the Court denied petitioners' timely petition for

[1] Source references herein are indicated by the following abbreviations:

Appendix to this petition—"App."
Certified Transcript —"Tr."
Record below —"R."

rehearing (Tr. 563). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 11 U.S.C. § 47c (Bankruptcy Act, § 24c).

Questions Presented for Review

1. Do §§ 222, 224, 228, and 229 of the Bankruptcy Act authorize, not the congruent alteration or modification of a confirmed plan of reorganization in a Chapter X proceeding, but its complete revocation after more than a year, so as to substitute a new plan that would destroy or adversely affect rights previously recognized in the confirmed plan.

2. Does § 229 authorize invalidation of a compromise settlement induced by a reorganization trustee and approved by a District Court and all creditors to avoid a mortgage foreclosure, on the faith of which the mortgage creditor fully performed to his irretrievable detriment, the benefits of which redounded to the debtor estate, on the theory that until a plan of reorganization is consummated no settlement is definitive and the misled mortgage creditor has no redress.

3. Where a plan of reorganization has been accepted or acquiesced in by all creditors (including the United States Government as a creditor) and confirmed, does § 229 authorize revocation of such confirmation so as to substitute a new plan, on the premise that no rights can vest before substantial consummation and the power of the Court to revoke decrees is unlimited.

4. Because Chapter X is involved, may a District Court summarily abrogate such settlement and revoke confirmation of the plan in drum head style, with no trial, merely on the petition of the trustee and in disregard of issues raised by the mortgage creditor.

5. Does a trustee, because he is a court officer, enjoy immunity from laches and estoppel, and is the debtor absolved from the consequences of his repudiation of commitments and lack of diligence.

Statutes Involved

The pertinent provisions of the Bankruptcy Act are §§ 27, 222, 224, 228, and 229 (52 Stat. 883, 11 U.S.C. §§ 50, 622, 624, 628, and 629) which are set forth at App. 14a-17a).

Statement of the Case

The Facts

This is an involuntary reorganization proceeding under Chapter X of the Bankruptcy Act, pending since June 27, 1957 in the United States District Court for the Southern District of Florida, Miami Division, of TMT Trailer Ferry, Inc., a maritime freight carrier (*Caplan* v. *Anderson*, 256 F. 2d 416, 417; *In The Matter of TMT Trailer Ferry, Inc.*, 292 F. 2d 455; App. 1a-11a). Petitioners (successors to Alex Caplan, trustee) are first preferred ship mortgagees in the principal sum of $330,000, of four vessels that were described by respondent below as "the backbone of the business" (R. 97, 98, 31, 33).

Early in the proceeding Caplan unsuccessfully sought leave in the District Court to foreclose; the Court of Appeals reversed, holding that "unless immediate and satisfactory provision is made for the protection and satisfaction of his debt, or a clear showing is made that his rights will not be affected by further delay", foreclosure must be permitted (*Caplan* v. *Anderson*, *supra*, 419; *TMT*, *supra*, 456).[2]

[2] On that appeal respondent represented that "there has been progress made toward the liquidation of a substantial portion of the balance of the obligations to" Caplan (*Caplan* v. *Anderson*, p. 419). The fact is that neither then nor to the present has anything been paid by way of interest or principal on petitioners' claim (R. 301).

Instead of granting that relief, the District Court ordered objections to be filed to the claim of petitioners and appointed a special master to hear and report on the validity, amount, and priority of lien claims. From that order, Caplan took a second appeal (*Caplan* v. *Anderson*, 259 F. 2d 283).

Respondent, the reorganization trustee, thereupon in October 1958 proposed to and urged petitioners to accept a compromise settlement consisting, on the one hand, of petitioners (1) withdrawing their then pending appeal, (2) forbearing from foreclosure, (3) permitting respondent to continue uninterrupted use of the encumbered vessels, and (4) approving provision in a plan of reorganization for payment of their claim partly in cash and partly in stock and another medium, and, on the other hand, (a) recognition of the validity and first priority of petitioners' mortgages and dismissal of the order from which the second appeal was then pending, and (b) modification of a plan of reorganization previously promulgated by respondent so as to include the agreed upon provision for petitioners (R. 28-31, 34-38, 40, 58-62, 75-77, 80, 84-87, 111, 114-117, 120, 193, 135-137, 181-185, 443-444, 446, 450, 452, 453-456, 458-460).

Respondent reported to the District Court that the settlement would eliminate protracted litigation, which, if petitioners prevailed, would render reorganization impossible, and also effect a prompt and successful reorganization through the extinguishment of the secured indebtedness of petitioners (R. 40, 111, 114-117, 453-454, 458-460). The Court concurred in the settlement as a fair solution, observing that there was no question but that petitioners had mortgages on the vessels (R. 446, 450, 454-455).

Respondent accordingly amended his plan of reorganization; the Court approved; all creditors accepted or acquiesced; and it was confirmed on March 9, 1959 (R. 35-36, 42-43, 88-119, 135-137, 181-185). Petitioners fulfilled all ob-

ligations on their part to be performed, including withdrawal of the then pending appeal (R. 35-36, 38, 301, 498). The order from which that appeal was taken, was vacated, the District Court finding that "the matters which were to be resolved by the Special Master were amicably resolved" (R. 191-193).

No appeals were taken from the order of confirmation except by a stockholders' protective committee and by the United States; the latter subsequently withdrew its appeal and accepted the plan (R. 38-43).[3] Between March 1959, when the plan was confirmed, and January 1960 the steps outlined in § 229 of the Bankruptcy Act constituting substantial consummation could not be undertaken because of those pending appeals (R. 208-211, 213-215). However, everything short thereof was completed, and on January 8, 1960 respondent moved to vest title in the reorganized corporation (R. 37-38, 41, 204-206, 213-215, 235, 244, 247, 249-251, 302).

On that date the United States Securities & Exchange Commission urged an investigation on the ground that certain beneficiaries of petitioners' trust allegedly had prereorganization dealings with the debtor or were influenced by persons who had such dealings, which might affect the validity of the mortgages (R. 216-232). Such investigation was ordered (R. 245-246).

Respondent took numerous unsupervised depositions, none before a court, referee, or special master, and that of the principal target was conducted *ex parte*, without notice to and in the absence of petitioners (R. 258-259).

On July 1, 1960 respondent filed a report of his investigation, recommending *inter alia* that confirmation of the plan of reorganization be vacated, a new plan be promulgated,

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[3] The stockholder appeal was never prosecuted but was consolidated almost two years later with petitioners' appeal and decided simultaneously with it (App. 6a).

and that objections be filed to petitioners' claim (R. 255-295).

It is undisputed and indisputable that neither then nor subsequently when the orders were made revoking confirmation of the plan did the Court even see the depositions or any of the exhibits on which respondent's investigation report is predicated. The proof thereof is that long after the orders had been made the District Court Clerk certified that of the 33 depositions taken by respondent, only 7 had even then been filed in whole or in part, 26 depositions and all exhibits being still unfiled; of the other 7 depositions, 4 in their entirety and part of one more were still in the sealed envelopes in which transmitted by the stenographer to the Court Clerk (R. 349-350).

On the return of the notice, petitioners filed a detailed answer controverting respondent's report in its entirety, and raising as issues the compromise settlement, vested rights, laches, estoppel, lack of jurisdiction of the Court to vacate the confirmation order, etc. (R. 298-304). No trial was held and no opportunity afforded to present evidence (R. 307). Five days later a preliminary order was entered that, upon remand of the stockholder appeal, a further order would be entered vacating confirmation of the plan of reorganization and directing respondent to prepare a new plan (R. 307-308, 181-185). No cognizance was taken of petitioners' answer or any issue therein raised (R. 298-304).

When, on respondent's application, the stockholder appeal was remanded, respondent moved on two days' notice for a final order of revocation (R. 314-316). On the return day no evidence was taken and no trial was conducted despite the interposition of a further answer by petitioners, and the order was signed forthwith that same day (R. 316-322, 324-326). It vacates confirmation of the plan and directs respondent to file a new one and take such action as

he deems appropriate in respect of petitioners' claim (R. 324-326). Among other distinctive features of the order are: (1) in their answer petitioners urged that their rights had become vested in that in reliance upon the occurrences recited above they had been induced to lose a strategic position, had sustained irreparable prejudice, and could not be restored to their prior status; with not even superficial observance of the requirements of a trial, the Court held the reverse (R. 298-304, 317-318, 325); (2) there was no finding that the plan was unfair or inequitable, only a recital that such was "the opinion of the trustee" (R. 325), which was equated with the function of the Court; there was complete abdication of jurisdiction to respondent, whose "opinion" was accepted as decisive, without opportunity for refutation; (3) no finding was made adverse to the validity of petitioners' secured debt; it sufficed—the order so reciting—that "It appears from the Trustee's report that there are substantial questions • • •" (R. 325); respondent having determined that there were "questions", the matter was thereby concluded; (4) the order of confirmation entered March 9, 1959 contains "Findings of Fact" that the plan of reorganization is fair, equitable, and feasible, was accepted in good faith, and that all other statutory requirements were observed (R. 181-185); Rule 52(a) of the Rules of Civil Procedure provides that such findings "shall not be set aside unless clearly erroneous"; no contrary findings were subsequently made by the District Court, and the record is devoid of admissible competent evidence establishing such findings to be erroneous.

The order further recites that it "appears that the Trustee's investigation disclosed facts not known to the Trustee or to the Court at the time the plan was confirmed" (R. 325). The reason for such recital was that petitioners' answer alleged that whatever was contained in respondent's investigation report "was either in (his) possession • • • or with the exercise of reasonable diligence • • • could have (been) obtained at any time prior to the compromise

settlement" (R. 302). The record establishes beyond cavil that 14 months elapsed between respondent's appointment and approval of the plan; confirmation did not occur until 3 months later; all the alleged events purportedly adverted to in the investigation report occurred prior to reorganization; information concerning them was at all times ascertainable from records in respondent's possession and persons available for examination; petitioners' predecessor volunteered on more than one occasion to produce whatever information and documentation were desired; and the matters, or most of them, on which the investigation report relies, were specifically brought to respondent's and the Court's attention prior to confirmation (R. 24-26, 31-32 35, 128, 131-132, 179-187, 226-229, 263 *et seq.*, 462-464).

On February 6, 1961 an order was entered essentially identical with the order from which respondent induced petitioners to withdraw their second appeal, appointing a special master to hear and consider objections to petitioners' claim, determine the amounts and priorities of liens against the encumbered vessels, etc. (App. 18a-19a).[4]

The Opinions Below

The District Court

No written opinions were rendered. The Court's rationale was that in a Chapter X proceeding, irrespective of settlements, confirmation, laches, vested rights, lack of diligence, and absence of jurisdiction;

> "you can open it up ten years later if you want to."[5]

The Court disavowed that its action implied that the settlement was invalid, that there had been any wrong-

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[4] By order of Court of Appeals made 2/21/61, the order above referred to and related papers were printed as an appendix.

[5] Minutes of District Court Hearing 1/27/61, printed as appendix below.

doing, or that petitioners' claim is deficient in any respect; on the contrary, the Court held:

> "Now, I don't say that there is anything I don't know, but I think that for the benefit of everybody concerned we ought to find out."[6]

The Court of Appeals

1. § 229, so far as material herein, defines when a plan of reorganization has been substantially consummated, and provides that it "may not thereafter be altered or modified" if it "materially and adversely affects the participation provided for any class of creditors or stockholders by the plan". That provision was misconstrued by the Court below as a grant of power to "set aside" completely a confirmed, unconsummated plan so as to substitute a new and different plan, fallaciously postulating it with a congruent alteration or modification of a subsisting plan (App. 8a-9a). The substantive difference between the two and the permissible scope of post-confirmation alterations have been clearly enunciated in other circuits (pp. 12-15, *infra*), and thus the opinion below creates an irreconcilable conflict in a most important area of corporate reorganizations.

2. Mr. Justice Frankfurter once wrote, "Putting the wrong questions is not likely to beget the right answers even in law" (*Vanston Committee* v. *Green*, 329 U. S. 156, 170). That quotation is apt here because the opinion below erroneously poses as the sole query to be answered: "When is a plan of reorganization so far 'consummated' as to deprive a trial court of its power to modify it or set it aside" (App. 2a). It ignores that, separable from the plan of reorganization and the treatment therein accorded petitioners, the settlement comprehended recognition of the validity and first priority of petitioners' mortgages on the encumbered property. Moreover, that

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[6] *Ibid.*

settlement and indeed every settlement in a Chapter X proceeding is declared to be tentative and ineffectual by the holding below that "there could be no 'settlement' until the reorganization had become consummated", that is to say, until "the actions described in Section 629 had been done" (App. 7a, 10a). This means that every lease, tax, lien, and other compromise settlement—without which few reorganization plans could be formulated—are unenforceable until after a plan has been not only promulgated, approved, and confirmed, but fully consummated, notwithstanding that the compromise was approved by the Court, and the trustee induced the other party fully to perform his part.

That is at variance with the statutory authority granted trustees with the approval of the Court to effect compromises of controversies at any time and any stage of the proceeding (§§ 27, 102).

That error is compounded by the holding below that petitioners have not been prejudiced by respondent's repudiation because the "second appeal (was) from an order of the trial court refusing them the right to an immediate foreclosure. But the order they are now appealing from is in no way related to such a right" (App. 10a). To the contrary, the second appeal (which was withdrawn in reliance upon the compromise) was from an order providing for the filing of objections to petitioners' claim and appointing a special master to hear and report thereon (*Caplan* v. *Anderson*, 259 F. 2d 283). When the settlement was concluded and the appeal withdrawn, that order was vacated by the District Court, which held that "the matters which were to be resolved by the Special Master were amicably resolved" (R. 191-193).[7]

[7] By order entered February 4, 1958 proofs of claim were to be filed within a prescribed time and deemed allowed unless objection was filed prior to confirmation; the time to file objections to petitioners' claim expired long prior to August 15, 1960, when the Court for the second time authorized respondent to attack it (R. 36, 46-49).

The final order revoking confirmation authorized respondent to contest the claim of petitioners (R. 324-326). It was implemented by an order of reference, which is a counterpart of the order from which the second appeal was taken (App. 18a-19a).

Furthermore, when petitioners discontinued their appeal and refrained from enforcing their mortgage rights, they lost their "strategic position" (to borrow the SEC's language in its brief below) and cannot be restored to their pre-settlement status. In this petition, however, it would be irrelevant to relate the destruction of some and the extent of the depreciation of others of the mortgaged vessels. Whether in the interim the fortunes of the debtor have fared, as respondent urged below, or they deteriorated, as petitioners urged, is also presently of no moment as the avowed purpose of the revocation of the confirmed plan is to harm the position of petitioners by no longer recognizing the validity and priority of their claim and by substituting a new plan less favorable to them.

3. The opinion below, as already shown, interprets § 229 as granting power to set aside confirmed plans of reorganization and as nullifying settlements made by a trustee. It elasticizes the section further to postpone the vesting of rights until after substantial consummation so as to neutralize the long standing rule that the power of courts of bankruptcy, being courts of equity, to vacate decrees is subject to intervening rights (pp. 16-18, *infra*).

Notwithstanding that respondent conceded below that petitioners had taken numerous steps "in reliance on compromise", including the dismissal of an appeal, forbearance from enforcing mortgages, etc., the Court of Appeals held that "no intervening rights had accrued. None of the actions described in Section 629 had been done" (App. 10a). In short, the vesting of intervening rights was held to be precluded until after substantial consummation had occurred.

4. Such basic equitable factors as laches, estoppel, and lack of diligence were held unavailable on the ground that "The trustee was a court officer. His duties are a part of judicial administration" (App. 10a). This is tantamount to a declaration that reorganization proceedings may be conducted by trustees in federal courts with no moral imperative.

Reasons for Allowance of Writ

1. The decision below that § 229 of the Bankruptcy Act grants the power to set aside a confirmed but unconsummated plan of reorganization is in conflict with decisions of the Second, Sixth, and Seventh Circuits.

In re Inland Gas Corporation, 275 F. 2d 509 (Sixth Circuit, 1960), cert. den. *sub. nom. Kern* v. *Columbia Gas System*, 363 U. S. 813 (June 1960);

Knight v. *Wertheim & Co.*, 158 F. 2d 838 (Second Circuit, 1946), cert. den. *sub. nom. McGuire* v. *Equitable Office Bldg., Corp.*, 331 U. S. 813;

Country Life Apartments v. *Buckley*, 145 F. 2d 935 (Second Circuit, 1944);

In re Diversey Building Corporation, 141 F. 2d 65 (Seventh Circuit, 1944).

§ 224 provides that "Upon confirmation of a plan • • • its provisions shall be binding upon the debtor • • • and upon all creditors and stockholders." That a final decree is to be entered when all steps completing consummation have been taken (§ 228) in no way alters the "binding" effect given the plan upon confirmation. That final decree is the terminal point in the reorganization, discharging the debtor and ending all rights of stockholders except as provided in the plan or order of confirmation, and discharging the trustee and closing the estate.

§ 222 provides that a plan "may be altered or modified before or after its confirmation". As applied to plans of reorganization subsequent to confirmation and prior to consummation, the first three cited cases hold that alterations and modifications may be made only if they are "congruent" with the plan, and that, under the guise of altering or modifying, a new plan may not be substituted.

Knight, Country Life, and *Diversey* were all decided before 1952 when § 229 was added. If the construction reached in those cases did not comport with the intent of the Congress, it could then have made its will plain. Instead, the legislative history of § 229 makes plain that its purpose was not to grant new power to alter or modify plans at variance with the holdings of the cited cases, but, following the *Knight* case, to impose "an absolute bar time" (Sen. Jud. Com. Rep. 1395, 82 Cong., 2nd Sess., p. 8).

Inland, decided some 8 years thereafter, cites those three cases with approval, reaffirms the principle enunciated by them, and obviously and correctly found nothing in § 229 inimical thereto.

In *Inland,* a Chapter X reorganization, promptly after confirmation and while the plan was wholly unconsummated, alterations and modifications were proposed, which the District Court declined to consider. The Court of Appeals affirmed on the ground that the proposed alterations and modifications

> "are not merely such, but in totality constitute an altogether new and different proposed plan of reorganization." (p. 511)

and that

> "District Judge Ford aptly stated that section 222 authorizes modification, but does not authorize 'stopping in the middle of a stream and starting a new plan with all of its problems afresh.' " (p. 514)

The opinion refers to *Diversey*, wherein the subsection of § 77B (the predecessor of Chapter X) that provided that changes and modifications might be proposed before or after confirmation, was held to mean

> "that changes and modifications *after the plan is confirmed* refer to such changes as will better aid in carrying out the plan which has been finally confirmed, and does not mean such changes or modifications as will materially alter the property rights established by the decree of confirmation." (p. 513; italics in original text)

Inland also refers to *Country Life*, a Chapter X proceeding in which amendments to the plan were offered at the time of confirmation; in affirming their rejection, the Court of Appeals held:

> "Appellants' proposals filed by way of objections, however, differed so greatly from the trustee's plan that they could not possibly be treated as a mere modification • • • (and) clearly constituted a newly proposed plan which could not be offered at this late stage of the proceedings." (p. 937)

Inland discusses *Knight* as follows:

> "Knight v. Wertheim, 2 Cir., 158 F. 2d 838, is regarded by appellants as strong authority in their behalf. We do not agree with their argument for, in that case, Judge Learned Hand said that the proposed changes were not so radical as to fall within the ambit of the court's previous decision in the Country Life Apartments v. Buckley case. • • •
>
> "Moreover, in Prudence Bonds Corporation v. City Bank Farmers Trust Co., 2 Cir., 186 F. 2d 525, 528, Judge Hand impressively said: '• • • the court may never under the guise of "alteration" or "modification" substitute an entirely new "plan" in place of the original;' " (p. 513)

Knight was a Chapter X proceeding in which after confirmation and before consummation stockholders proposed alterations and modifications that affected the plan in but one respect: instead of debenture holders being paid in new convertible bonds and stock, the stock would be sold and from the proceeds the debenture holders would be paid in cash in full with interest. Judge Learned Hand, writing for the Court, held

> "We said in our opinion (*Country Life Apartments* v. *Buckley*) that there was a limit to what might be considered an 'alteration' or a 'modification' and that the proposal had exceeded it; and the Seventh Circuit spoke (in Diversey) of the court's not having 'jurisdiction' to act upon the proposal; we agree that, although there appear to be no limits to the changes which may be made in a plan before 'approval', and indeed thereafter, until 'its submission for acceptance' under Section 179, 11 U.S.C.A. § 579, nevertheless any changes after submission must be to some extent congruent with the plan." (p. 842)

The modification proposed there was held to be in that category inasmuch as the debenture holders would receive full payment and thus not be adversely affected.

In direct conflict with those decisions, the Court below herein endows §§ 222 and 229 with a meaning that no fair reading of the statutory language yields. Whereas the sections refer to "alteration or modification" of a plan, and the cited decisions require that any post-confirmation changes be consistent with the plan, the opinion below rewrites the sections to authorize revocation of confirmation to pave the way for "a new plan of reorganization" (R. 325).

Unless reversed, it will make precarious all interests in reorganization proceedings right up until the estate is closed.

2. The holding below that there can be no compromise settlement of a claim in a reorganization proceeding until after substantial consummation of a plan conflicts with decisions in the Third, Seventh, and Tenth Circuits.

Hanssen v. *Wingren*, 121 F. 2d 1011 (Tenth Circuit, 1941), cert. den. 256 U. S. 694;
In re Trustees System Discount Co. of Chicago, 85 F. 2d 467 (Seventh Circuit, 1936), cert. den. *sub nom. Wilson* v. *Metropolitan Life Ins. Co.*, 295 U. S. 599;
In re Technical Marine Maintenance Co., 169 F. 2d 548 (Third Circuit, 1948).

The cited cases hold that there may be a settlement apart from a plan of reorganization and that a trustee is bound to perform his commitments irrespective of whether or not consummation has occurred.

3. In conflict with the decisions of this Court, the opinion below permits revocation of decrees on which litigants have acted to their irretrievable detriment, on the premise that no intervening rights can vest before substantial consummation.

This Court has held that judicial power to revise judgments must be exercised before intervening rights have vested on the faith of its action (*Wayne United Gas Co.* v. *Owens-Illinois Glass Co.*, 300 U. S. 131, 136-137; *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, 152; see also *Curtis* v. *O'Leary*, 131 F. 2d 240, 245).

The Court below, while purporting to recognize that principle, sterilizes its efficacy by holding that in a Chapter X proceeding there can be no definitive adjudication under which rights vest until after substantial consummation of a plan of reorganization has occurred (App. 7a-10a). As so interpreted, no creditor is afforded any protection by

any order of a Court until the estate is closed. At any time prior thereto, he is exposed to the danger of repudiation, notwithstanding that he has fully performed all obligations undertaken by him and cannot be made whole.

It has been shown hereinabove that petitioners were induced to dismiss an appeal, withhold enforcement of their mortgage rights, etc., in reliance upon an order of the District Court vacating a previous order directed at the validity, amount, and priority of their claim, and upon an order confirming a plan of reorganization that contained agreed upon treatment of their claim. Petitioners cannot now be restored to their pre-settlement status, and their rights have intervened and vested, regardless of whether or not substantial consummation has occurred (*Haussen* v. *Wingren, supra; In re Trustees System Discount Co. of Chicago, supra; In re Technical Marine Maintenance Co., supra; Petition of Baxter* (*In re Orinoco Corp.*) 269 F. 344, Sixth Circuit, cert. den. 256 U. S. 694; *In re Hinckel Brewing Co.*, 123 F. 942; *Larson* v. *First State Bank of Vienna*, 21 F. 2d 936; *Standard Steel Works* v. *American Pipe & Steel Corp.*, 111 F. 2d 1000; *In re Sobod, Inc.*, 25 F. Supp. 344, affd. 103 F. 2d 1019).

The opinion below fails to recognize that there can be—as there was in this case—a settlement of a claim that is separable from the treatment to be accorded it under a plan of reorganization. The issue of amount, validity, and priority of the claim of petitioners was, as the District Court ordered, "amicably resolved" (R. 191-193).

As to the treatment to be accorded petitioners in the plan, *Inland* and *Diversey* disagree with the Court below herein and prohibit not merely post-confirmation substitution of a new plan, but also alterations that "will materially alter the property rights established by the decree of confirmation" (p. 513). *Knight*, consistent therewith, although permitting a post-confirmation modification, held the power of modification to be subject to the stricture that the alteration must be "congruent" with the plan.

Payment in full in cash with interest, in lieu of payment partly in cash and partly in other media, might be such an alteration as would not adversely affect petitioners and be permissible within the *Knight* holding. But complete rejection of the plan in order to enable respondent to take such action as he deems appropriate in respect of the claim of petitioners and to submit a new plan clearly violates their vested rights (R. 324-326).

To achieve that result the District Court relied upon some undefined and unstated power in any event to "open it up 10 years later". The Court of Appeals did not go that far, but in effect remolded the bar provision of § 229 against alteration and modification after substantial consummation into a divestiture of rights previously established. For that, there is no precedent, and unless reorganization proceedings are to be rendered chaotic, reversal by this Court is required.

4. The order revoking confirmation of the plan of reorganization was made without affording petitioners even a semblance of a judicial hearing.

The Court of Appeals held that "for good cause shown" the District Court could "withdraw its prior approval" and that a "sufficient showing" had been made herein by respondent's investigation, which "disclosed" certain matters (App. 5a, 9a).

That conflicts with the District Court's disavowal that it had found adversely to the propriety of the settlement or the validity of petitioners' claim (pp. 8-9, *supra*). Moreover, in revoking the settlement and confirmation the District Court disregarded even the rudimentary requirements of a judicial hearing: it acted summarily, without a trial, with no evidence before it, without even seeing the challenged and inadmissible documentation on which respondent's report was based, with no consideration of the issues raised by petitioners, and without making any findings (pp. 5-8, *supra*).

The orders in question were only nominally those of the District Court, which completely abdicated the judicial function to respondent, who was granted *carte blanche* to determine this most vital aspect of the reorganization.

Such practice is a perilous precedent for the conduct of reorganization proceedings.

5. The decision below exempting respondent from laches, estoppel, and lack of diligence because he is a court officer, is in conflict with holdings of the Second, Third, Sixth, and Seventh Circuits.

Petition of Baxter (In re Orinoco Corp.) supra (Sixth Circuit);
In re Trustees System Discount Co. of Chicago, supra (Seventh Circuit);
In re Universal Rubber Products Co., 25 F. 2d 168, affd. 28 F. 2d 253 (Third Circuit);
Nichols v. *Alker*, 231 F. 2d 68 (Second Circuit), cert. den. 352 U. S. 829.

CONCLUSION

For the foregoing reasons a writ of certiorari should be allowed.

Dated: November 10, 1961.

Respectfully submitted,

M. JAMES SPITZER,
Attorney for Petitioners.

REICH, SPITZER & FELDMAN,
KNIGHT, SMITH, UNDERWOOD & PETERS,
of Counsel.

Opinion of the United States Court of Appeals for the Fifth Circuit.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18475

IN THE MATTER

of

TMT TRAILER FERRY, INC., Debtor, ARTHUR H. SHAFFER and M. JAMES SPITZER, Trustees; THE PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC.,

Appellants,

versus

C. GORDON ANDERSON, as Trustee in Reorganization,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

(July 7, 1961.)

Before TUTTLE, Chief Judge, and CAMERON and JONES, Circuit Judges.

TUTTLE, Chief Judge: This appeal tests the correctness of the order of the trial court, sitting as a bankruptcy court in a Section X reorganization proceeding,

setting aside its previous order confirming a plan of reorganization. The answer depends upon the answer to the question: When is a plan of reorganization so far "consummated" as to deprive a trial court of its power to modify it or set it aside?

The tortuous trial of this litigation makes the present problem of the Court appear much more difficult than it really is. The history necessary for a determination of the issues before us can be relatively simply stated.

An involuntary petition under Chapter X of the Bankruptcy Act was filed June 27, 1957. The debtor initially opposed the petition and the Court permitted the debtor to operate its business while it tried to solve its financial problems. The debtor's efforts were not successful, so on November 15, 1957, it filed its petition consenting to reorganization. On November 18th an order was entered for reorganization and trustees were appointed. The trustees had no cash and the business was not being operated. However, they borrowed some money and started moving freight in the three barges owned by the company and covered by a first preferred ship mortgage held by one Caplan, a predecessor of the appellants, Shaffer and Spitzer, as trustees for a group of mortgagees. A fourth vessel was chartered under circumstances that turned out to be profitable. Throughout the first several months of such operation the Caplan mortgage interests opposed the efforts of the trustees and they continually sought leave to foreclose their mortgage. The amount of the mortgage claim was $330,000.00. The refusal of the trial court to grant them permission to foreclose resulted in the first appeal to this Court. Our decision in that case, *Caplan* v. *Anderson, Trustee, etc.;* 5 Cir., 256 F. 2d 416, directed that "unless immediate and satisfactory provision is made for the protection and satisfaction of [the mortgage] debt, or clear showing is made that [the mort-

gagee's] rights will not be affected by further delay," the trial court must permit a foreclosure of the mortgage.

Upon remand the trustee continued to operate the company in a manner that began to produce a substantial profit. The trial court began proceedings to marshal the liens against the vessels, and the trustees, after much discussion among the many secured and unsecured creditors, who asserted claims of some ten million dollars against the company, proposed a plan of reorganization. Under this plan the Caplan mortgage group was to surrender its mortgage liens on the vessels and were to receive all of the shares of common stock, 250,000 shares of convertible preferred stock, and one vessel free and clear together with some cash earned during the operation. The unsecured creditors were to receive 17½% of their claims in convertible preferred stock. Other maritime lien claimants against the vessel were to receive cash and preferred stock. The Caplan group was to elect six of the nine members of the board of directors and the unsecured creditors were to elect three members.

During the pendency of the proposal to adopt this plan, the trial court, on February 24, 1959, without a hearing called for that purpose, but based on documents and records of file, made a finding of insolvency as of July 25, 1958. This was coupled with a finding that the original stockholders of the corporation had no further interest in the reorganization. There were a large number of common stockholders, many of whom had purchased their stock from persons later found to have been associated to some extent with the Caplan mortgage group. A relatively small number of these stockholders were represented in the proceedings by a stockholders committee.

With the consent of all parties other than the stockholders committee, the United States as a tax creditor,

and the Securities & Exchange Commission, which intervened by reason of the provisions of Section 208 of Chapter X of the Bankruptcy Act,[1] the trial court confirmed the plan of reorganization on March 9, 1959. The stockholders committee and the United States appealed from this order of confirmation. The appeal of the United States was later voluntarily dismissed. The appeal was not prosecuted to a conclusion but has now been consolidated with the appeal that is now being considered. The earlier appeal was predicated on the failure of the trial court to order the trustee to conduct an investigation under Section 167 of the Bankruptcy Act, and on a failure of the court to conduct a hearing on insolvency of the debtor and to make findings of its assets and prospective earnings.

The objection of the Securities and Exchange Commission to the confirmation was also based on the failure of the trial court to order the trustee to conduct an investigation under Section 167 prior to confirming the reorganization plan. Pending the appeal from the confirmation of the plan no steps were taken towards its consummation. In the meantime the trustees continued to operate the company on an increasingly profitable basis. On December 31, 1959, Caplan filed a petition for leave to consummate the plan of reorganization, asserting

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[1] "§ 608. Intervention of Securities and Exchange Commission. The Securities and Exchange Commission shall, if requested by the judge, and may, upon its own motion if approved by the judge, file a notice of its appearance in a proceeding under this chapter. Upon the filing of such a notice, the Commission shall be deemed to be a party in interest, with the right to be heard on all matters arising in such proceeding, and shall be deemed to have intervened in respect of all matters in such proceeding with the same force and effect as if a petition for that purpose had been allowed by the judge; but the Commission may not appeal or file any petition for appeal in any such proceeding." 11 U.S.C.A. § 608.

that no supersedeas had been taken during the appeal of the stockholders committee. On January 8, 1960, the trustee filed a similar petition, and on the same day the Securities & Exchange Commission filed its objections to the consummation of the reorganization plan. It also filed a petition on the same day requesting an investigation, and attached an affidavit of its financial analyst, setting forth the results of an investigation, which disclosed that participants in the Caplan mortgage, or persons associated with them, had had extensive dealings in TMT stock. The Securities and Exchange Commission expressed a strong opinion that an investigation would disclose that the reorganization plan would be unfair in turning the corporation over to persons, or close associates of persons, who had dealt extensively in the stock of the company in transactions which the S.E.C. asserted were of questionable legality. The position of the S.E.C. was shared by Tri-Continental Financial Corporation, a creditor with a claim of more than $800,000. This company, although having formerly approved the plan, now opposed the order of consummation. These objections came on for a hearing and all parties, including the appellant here, the Caplan group, agreed that an investigation should be made. Thereupon the court entered its order for investigation under Section 167 of the Bankruptcy Act.

The trustee made a thorough investigation which disclosed numerous transactions between members of the Caplan group and one Abrams, who had obtained and sold many shares of TMT stock without compliance with the requirements for registration with the SEC. The report showed that some of the mortgagees received stock in addition to an obligation to pay approximately 15% interest on the mortgage debt. Other facts were asserted in the report of investigation, including a suggestion that

there were possible defenses to the Caplan mortgage. Thereupon, the trustee, changing his position, strongly opposed an order of consummation and urged that the court enter an order setting aside the plan of reorganization and permitting the trustee to seek appropriate relief with respect to the Caplan claim. In response to an invitation from the court, all parties except the Caplan mortgage interests either approved or acquiesced in the trustee's recommendations. Thereupon, the trial court, having determined that nothing had been done to consummate the plan, and finding that certain facts touching on the fairness of the plan had not been known to the creditors and to the court at the time of the order of confirmation, entered its order setting aside the March 9, 1959 order of confirmation, and directed the trustee to proceed as he saw fit to contest the Caplan mortgage. It is this order setting aside the order of confirmation that is here appealed from.

Touching first on the original appeal by the stockholders committee from the order of confirmation, we note that the Caplan group contends that the committee had no standing to appeal because a prior order of insolvency and determination that the stockholders had no equity stood unappealed from and was thus binding.[2]

We do not need to determine this question, however, because in our opinion the later action of the trial court in itself setting aside the order of confirmation rendered the prior appeal moot.

We thus come to the later appeal taken by the Caplan-Spitzer-Shaffer group. These parties originally appeared in the litigation determinedly seeking the right to an immediate foreclosure of their mortgage. They now appear

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[2] Such an interlocutory order is appealable in Bankruptcy. see 11 U.S.C.A. 47, 48.

here just as determined to maintain the position which the plan of reorganization gave them, i.e., as owners of the entire voting stock and of substantial convertible preferred stock and with no mortgage on the reorganized company's barges or ships. They no longer wish an immediate foreclosure, which is understandable in view of the fact that the trustees' operation of the debtor company has demonstrated the company's ability to earn annual net operating profits before income taxes of more than $200,000.

The main thrust of appellants' argument that the trial court did not have the power to set aside its order of confirmation is twofold. First, all the creditors agreed to the reorganizaion plan; it therefore became a compromise settlement which is binding on all; second, in any event the trial court could not set aside the order of confirmation because rights had vested under it. There is the subsidiary argument that the parties should be barred by laches and delay in seeking to upset the earlier order.

On the other hand, all the parties to the reorganization, the trustees, the principal unsecured creditors, the stockholders committee, and the S.E.C., contend that there could be no "settlement" until the reorganization had become consummated and that no consummation had occurred because no steps had been taken to put it into effect.

We conclude that the latter view is the correct one.

Appellants' contention that the acceptance of the reorganization plan by all the affected parties except the common stockholders amounted to a legally binding compromise independently of the final conclusive effect of the court's order upon consummation seems unsupported in law. It is true that the requisite acceptances of the reorganization plan were filed with the court. Appellants contend that this amounted to a compromise that was final and binding when the order of confirmation was entered by the court. They

cite only three bankruptcy court cases in support of this proposition: In Re Orinoco Corp., 269 Fed. 344, cert. den. 256 U. S. 694; In Re Sobod, 25 F. Supp. 344, aff'd. 103 F. 2d 1019, and In Re Chatham Jewelers, 108 F. Supp. 385. None of these cases supports the proposition advanced by the appellants. In the first place, none of them deals with a Chapter X Reorganization as to which the bankruptcy laws contemplate a great deal of flexibility in the proceedings before the trial court. *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144. Moreover, in the Orinoco case the court expressly found that the settlement had already been carried out and that there was no way in which one party could be made whole if the compromise were set aside. In the other two cases the District Court merely held that in a claim compromise approved in an ordinary bankruptcy, the trustee could have specific performance in a summary proceeding.

We conclude that whatever acceptances of the plan of reorganization were given by the several parties, they were given under the specific provisions of Chapter X, and the parties did not intend to enter into or be bound by any compromise except to the extent that a final binding consummation of the plan would be a compromise.

Chapter X itself contemplates the entry by the trial court of a final decree in consummation of the plan. 11 U.S.C.A. 628. Moreover, Section 629 specifies what acts are deemed to consummate a plan.[1] As will be noted, this section pro-

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[1] "§ 629. Acts deemed consummating plan; order declaring consummation; substantial alteration or modification

(a) A plan shall be deemed to have been substantially consummated if, insofar as applicable, each of the following events has occurred:

(1) transfer, sale or other disposition of all or substantially all of the property dealt with by the plan pursuant to the provisions of the plan;

vides that *after a plan has been substantially consummated as defined,* "the plan may not thereafter be altered or modified . . ." By clearest implication this should indicate that until there is substantial consummation the plan is subject to modification for proper cause shown.

We think the true rule is that unless there has been such consummation that a modification would unfairly affect the complaining party he cannot successfully resist a decision by the trial court for good cause shown to withdraw its prior approval. This is consistent with the language of the Supreme Court in *Pfister* v. *Northern Illinois Finance Corp., supra,* at page 152:

> "Courts of bankruptcy are courts of equity without terms . . . The entire process of rehabilitation, reorganization or liquidation is open to reexamination out of time by the District Court, in its discretion, and subject to intervening rights."

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(2) assumption of operation of the business and management of all or substantially all of the property dealt with by the plan by the debtor or by the corporation used for the purpose of carrying out the plan; and

(3) commencement of the distribution to creditors and stockholders, affected by the plan, of the cash and securities specified in the plan as provided for in section 624 of this title.

(b) Upon notice to the trustee, the debtor, the Securities and Exchange Commission and such other persons as the judge may designate, the trustee, the debtor in possession, the corporation to which the assets of the debtor are to be transferred under the plan, or any other party in interest may apply to the judge for an order declaring the plan to have been substantially consummated under the provisions of subdivision (a) of this section.

(c) When a plan has been substantially consummated as defined in subdivision (a) of this section, or an order has been entered under subdivision b of this section, the plan may not thereafter be altered or modified if the proposed alteration or modification materially and adversely affects the participation provided for any class of creditors or stockholders by the plan."

11 U.S.C.A. § 629.

Here no intervening rights had accrued. None of the actions described in Section 629 had been done. The appellants claim they were prejudiced because they voluntarily dismissed a second appeal from an order of the trial court refusing them the right to an immediate foreclosure. But the order they are now appealing from is in no way related to such a right. Any action which they voluntarily took in order to place themselves in a position to work with the debtor's trustee and the other creditors in an effort to devise a satisfactory plan of reorganization necessarily involved the risk that such a plan might not be confirmed, or if confirmed, that it might subsequently be modified to the extent permitted by law.

There is no merit in the contention that the trustee for the debtor and the other parties should be barred to urge the court to revoke the order of confirmation because of laches. The trustee was a court officer. His duties are a part of judicial administration. The rights of the parties he represents may not lightly be prejudiced because the administration of the debtor's affairs under court supervision was somewhat delayed. We think sufficient showing was made to warrant the court's decision that its earlier order of confirmation was not for the best interests of the parties and we think that neither the court nor its officer is barred by laches from proceeding with a proper administration of the debtor's affairs. Of course, proper administration comprehends as prompt disposition of the Chapter X proceedings as is reasonably possible.

Appellants additionally complain of the entry of several orders involving the sale of a damaged vessel, the purchase of a new one, authorizing its very substantial alteration, and the leasing of dock facilities. They appealed from each of the orders. In no case was a supersedeas sought or granted. It was the duty of the trustee in reorganization to maintain the going-concern value of the debtor.

Collier, 14th ed., Vol. 6, p. 3446. See also, Remington, 1961 ed., Vol. II, pp. 212-213, where it is said:

> "An order authorizing a trustee or debtor in possession to continue the debtor's business impliedly authorizes the making of customary expenditures and the incurring of obligations in the ordinary courses of business, including buying on credit, without special order."

Appellants fail to show how their position as mortgage holders has been in any way jeopardized by the orders complained of. We think, therefore, that no basis for reversal of the administrative orders is shown.

The orders of the trial court appealed from by Shaffer and Spitzer, trustees, are AFFIRMED.

A true copy

Test: EDWARD W. WADSWORTH,
Clerk, U. S. Court of Appeals,
Fifth Circuit.

By CLARA R. JAMES,
Deputy

New Orleans, Louisiana

OCT. 23, 1961

Judgment.

Extract from the Minutes of July 7, 1961.

IN THE MATTER

of

TMT TRAILER FERRY, INC., Debtor, ARTHUR H. SHAFFER and M. JAMES SPITZER, Trustees; THE PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC.; UNITED STATES OF AMERICA,

No. 18475 *versus*

C. GORDON ANDERSON, as Trustee in Reorganization.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the orders of the trial court appealed from by Shaffer and Spitzer, trustees, in this cause be, and the same are hereby, affirmed;

It is further ordered and adjudged that the appellants, Arthur H. Shaffer and M. James Spitzer, Trustees, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

Order Denying Rehearing.

[455]

IN THE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 18,475

In the Matter of

TMT TRAILER FERRY, INC., Debtor, ARTHUR H. SHAFFER and M. JAMES SPITZER, Trustees; THE PROTECTIVE COMMITTEE FOR INDEPENDENT STOCKHOLDERS OF TMT TRAILER FERRY, INC.; UNITED STATES OF AMERICA,

Appellants,

v.

C. GORDON ANDERSON, as Trustee in Reorganization,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

(August 18, 1961)

ON PETITION FOR REHEARING

Before: TUTTLE, Chief Judge, CAMERON and JONES, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

Text of Statutes Involved.

Sec. 27*. (11 U.S.C. § 50.) Compromises

The receiver or trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate.

Sec. 222. (11 U.S.C. § 622.) Alteration or Modification of Plan

A plan may be altered or modified, with the approval of the judge, after its submission for acceptance and before or after its confirmation if, in the opinion of the judge, the alteration or modification does not materially and adversely affect the interests of creditors or stockholders. If the judge finds that the proposed alteration or modification, filed with his approval, does materially and adversely affect the interests of creditors or stockholders, he shall fix a hearing for the consideration, and a subsequent time for the acceptance or rejection, of such alteration or modification. The requirements in regard to notice of hearing, to submission to the Securities and Exchange Commission, to acceptance, to filing and hearing of objections to confirmation and to the confirmation, as prescribed in article VII of this chapter in regard to the plan proposed to be altered or modified, shall be complied with.

• • •

Sec 224. (11 U.S.C. § 624.) Effect of Confirmation

Upon confirmation of a plan—

(1) the plan and its provisions shall be binding upon the debtor, upon every other corporation issuing securities or acquiring property under the plan, and upon all

* Section 102 (11 U.S.C. § 502) makes Section 27 applicable to proceedings under Chapter X.

creditors and stockholders, whether or not such creditors and stockholders are affected by the plan or have accepted it or have filed proofs of their claims or interests and whether or not their claims or interests have been scheduled or allowed or are allowable;

(2) the debtor and every other corporation organized or to be organized for the purpose of carrying out the plan shall comply with the provisions of the plan and with all orders of the court relative thereto and shall take all action necessary to carry out the plan, including, in the case of a public-utility corporation, the procuring of authorization, approval, or consent of each commission having regulatory jurisdiction over the debtor or such other corporation;

(3) if the judge shall so direct, there shall be deposited and distributed, in such manner as the judge may direct, the moneys for all payments which by the provisions of the plan or under this chapter are required to be made in cash; and

(4) distribution shall be made, in accordance with the provisions of the plan, to creditors and stockholders (a) proofs of whose claims or stock have been filed prior to the date fixed by the judge and are allowed, or (b) if not so filed, whose claims or stock have been listed by the trustee or scheduled by the debtor in possession and are not contingent, unliquidated or disputed.

• • •

Sec. 228. (11 U.S.C. § 628.) Final Decree on Consummation of Plan

Upon the consummation of the plan, the judge shall enter a final decree—

(1) discharging the debtor from all its debts and liabilities and terminating all rights and interests of stockholders

of the debtor, except as provided in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of property;

(2) discharging the trustee, if any;

(3) making such provisions by way of injunction or otherwise as may be equitable; and

(4) closing the estate.

• • • • •

Sec. 229. (11 U.S.C. § 629.)

a. A plan shall be deemed to have been substantially consummated if, insofar as applicable, each of the following events has occurred:

(1) transfer, sale or other disposition of all or substantially all of the property dealt with by the plan pursuant to the provisions of the plan;

(2) assumption of operation of the business and management of all or substantially all of the property dealt with by the plan by the debtor or by the corporation used for the purpose of carrying out the plan; and

(3) commencement of the distribution to creditors and stockholders, affected by the plan, of the cash and securities specified in the plan as provided for in section 224 of this Act.

b. Upon notice to the trustee, the debtor, the Securities and Exchange Commission and such other persons as the judge may designate, the trustee, the debtor in possession, the corporation to which the assets of the debtor are to be transferred under the plan, or any other party in interest may apply to the judge for an order declaring the plan to have been substantially consummated under the provisions of subdivision a of this section.

c. When a plan has been substantially consummated as defined in subdivision a of this section, or an order has been entered under subdivision b of this section, the plan may not thereafter be altered or modified if the proposed alteration or modification materially and adversely affects the participation provided for any class of creditors or stockholders by the plan.

Order Appointing Special Master.

This cause came on for hearing before the court pursuant to notice to interested parties on January 27, 1961 on the Petition of the Trustee for the appointment of a Special Master to consider certain issues with respect to liens claimed against the ships of the debtor. The court has considered the argument and representations of counsel for various parties and is of the opinion that a determination of such issues must be made before a plan of reorganization can be prepared by the Trustee and considered by the court. The court has also considered the objection on jurisdictional grounds filed by Arthur H. Shaffer and M. James Spitzer as trustees, and is of the opinion that it is the duty of the court to proceed with the determination of all issues which must be settled before a plan of reorganization can be considered and that the objections to the jurisdiction of this court should be overruled, there being no supersedeas or staying of these proceedings.

WHEREFORE it is ORDERED, ADJUDGED and DECREED as follows:

1. The objections on jurisdictional grounds filed by Arthur H. Shaffer and M. James Spitzer as successor trustees are hereby OVERRULED.

2. That E. A. Bosarge is hereby appointed as Special Master to:

a) Hear and consider the objections filed by the trustee to the claim of Arthur H. Shaffer and M. James Spitzer as successor trustees, and report his findings and recommendations thereon to the court.

b) Determine the liens and the respective amounts thereof, that should be allowed against the ships of the debtor, the TMT Georgia, TMT Carolina, TMT Puerto

Rico, TMT Cuba, TMT Lloyd, that arose prior to the appointment of the trustee herein on November 15, 1957, and determine the priorities among the respective lien claimants with respect to each ship.

c) Recommend what disposition should be made of the claims of Precision Sheet Metal Works and Leathercraft Upholsterers.

d) Determine and recommend what disposition should be made of any other issues that may appear herein with respect to any liens claimed against said ships that arose prior to the appointment of the trustee herein and have been properly filed herein.

e) Determine and recommend the valuations to be placed upon each of the said vessels, other than the TMT Puerto Rico for which a separate fund has been established, for the purpose of finding the total amount of such claims as should be allowed as liens and such addiional amounts as should be allowed as unsecured.

f) Make findings and recommendations to the court with respect to all such issues.

3. The trustee is authorized to pay necessary expenses in connection with depositions and all testimony taken in proceedings before the Special Master.

DONE and ORDERED at Miami, Dade County, Florida, this 6th day of February, 1961.

/s/ EMETT C. CHOATE,
United States District Judge.

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Supreme Court, U.S.
FILED

No. 544

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 544

ARTHUR H. SHAFFER AND M. JAMES SPITZER,
PETITIONERS

v.

C. GORDON ANDERSON, AS TRUSTEE IN REORGANIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION[1]

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a–11a) is reported at 292 F. 2d 455. There was no opinion of the District Court.

JURISDICTION

The judgment of the Court of Appeals was entered on July 7, 1961 (Pet. App. 1a). A petition for rehearing was denied on August 18, 1961 (Pet. App.

[1] The Securities and Exchange Commission was a party in the district court pursuant to Section 208 of the Bankruptcy Act and participated as an appellee in the court of appeals by filing a brief and by oral argument.

13a). The petition for a writ of certiorari was filed on November 13, 1961. The jurisdiction of this Court is invoked under Section 24c of the Bankruptcy Act, 11 U.S.C. 47c, and 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a proceeding under Chapter X of the Bankruptcy Act, the district judge, prior to consummation of a plan of reorganization, may vacate his order confirming the plan because of facts existing at the time of confirmation, not then known to the district judge but subsequently disclosed, which rendered the plan unfair.

STATUTE INVOLVED

Pertinent provisions of the Bankruptcy Act (52 Stat. 840, 11 U.S.C. 1, *et seq.*) are set forth in the Appendix, *infra*, pages 15–16.

STATEMENT

This case involves the validity of a district court order which vacated a previous order confirming a plan of reorganization of TMT Trailer Ferry, Inc. ("the debtor"), a company being reorganized under Chapter X of the Bankruptcy Act in the United States District Court for the Southern District of Florida.

The reorganization proceeding was initiated on June 27, 1957, by the filing by creditors of a petition for reorganization (R. 21).[1] The petition was ap-

[1] "R." refers to the printed transcript of record in the court of appeals.

proved on November 15, 1957, and a trustee was appointed (R. 25). A plan of reorganization was filed by the trustee on August 29, 1958 and subsequently was amended (R. 88–120, 138–162). As ultimately amended, it provided that the stockholders would not participate in the reorganized corporation (R. 152) and that control thereof would be given to petitioners Arthur H. Shaffer and M. James Spitzer, and others associated with them (R. 147, 157). Petitioners are indenture trustees under mortgages on various properties of the debtor (herein referred to as "the Caplan mortgage").

On December 19, 1958 the Securities and Exchange Commission filed objections to the trustee's plan of reorganization (R. 123–125). The Commission pointed out, among other things, that the trustee had not made the investigation and report contemplated by Section 167 of the Bankruptcy Act for the purpose of determining the assets and liabilities of the debtor and possible causes of action on its behalf; and that no record had been made with respect to prospective earnings and the value of the debtor's assets to provide a basis for determining whether, under the standard of Section 174, the plan was "fair and equitable." A Protective Committee for Independent Stockholders also filed similar objections (R. 126–134).

The plan was approved by the district judge on January 15, 1959 (R. 135–137).

After the plan had been submitted for acceptance to creditors, the Commission objected to confirmation for substantially the same reasons for which it had

objected to approval (R. 169–171). On March 6, 1959, the district judge confirmed the plan (R. 181–185).[3]

Prior to confirmation there had been rumors that the then indenture trustee under the Caplan mortgage was acting for one Joseph Abrams, who was believed to be largely responsible for the debtor's financial difficulties (R. 180). After confirmation, the Commission filed on January 8, 1960, a petition requesting an order (1) staying consummation of the plan, and (2) directing the trustee (a) to make a detailed investigation and report of the debtor's affairs and (b) to institute suit to recover any money or property improperly taken from the debtor (R. 219–224). Attached to the petition was an affidavit by a financial analyst of the Commission (R. 224–230) which showed that prior to the reorganization Abrams had acquired large amounts of the debtor's securities at prices substantially under the market, and that while Abrams was a substantial stockholder he or his associates had entered into certain improper transactions with the company. The affidavit also suggested that Abrams

[3] The Protective Committee appealed from the order of confirmation on the grounds that there had not been a hearing as to the insolvency of the debtor, and that the court had failed to order an investigation by the trustee pursuant to Section 167 and to make findings as to the value of the debtor's assets and its prospective earnings (R. 206–207). This appeal was subsequently stayed by agreement, pending the investigation referred to in the text, *infra*. The Committee's appeal was argued in the court of appeals together with the appeal from the district court orders that petitioners now seek to review in this Court. In view of its affirmance of the latter orders, the court of appeals held that the appeal by the Protective Committee was moot (Pet. App. 6a).

and his associates were the owners of the Caplan mortgage and, hence, under the confirmed plan of reorganization would obtain control of the reorganized debtor (R. 224–230). Upon the filing of this affidavit all parties consented to an investigation by the trustee (R. 258), which the court ordered on January 22, 1960 (R. 245).

The trustee, with the assistance of members of the Commission's staff, conducted an investigation from January until May 1960. The inquiry was conducted primarily through depositions, and all creditors and stockholders represented in the reorganization were permited to participate. Testimony of thirty-three witnesses covering 2200 pages was taken and sixty exhibits were received (R. 259–260).

On July 1, 1960, the trustee filed a lengthy report (R. 255–295), in which he concluded that the debtor's business "was wrecked by gross mismanagement, by unwise and unsound expansion financed primarily through the sale of securities in disregard of the protective provisions of the Securities Act of 1933" (R. 260). He stated that the Caplan mortgage group, which would have controlled the company under the plan, is dominated by Shaffer, one of the successor indenture trustees; and that Shaffer and Abrams had speculated and profited greatly from sales of the debtor's stock made in violation of the Securities Act of 1933 (R. 262, 263, 265, 281). The report also revealed various questionable transactions between the debtor and Abrams and his associates, and concluded that substantial causes of action existed against Abrams

for his role in causing the acquisition by the debtor of certain property in Wilmington, Delaware (R. 266–270, 291–292).

The trustee also reported that "causes of action and defenses exist against the holders of the Caplan mortgage, individually and as a group, which should affect their status as creditors and stockholders"; and that that mortgage "was a fraudulent transfer as defined by Section 67(d)(2) of the Bankruptcy Act (11 U.S.C. 107(d)(2))" (R. 282). The trustee concluded that the order confirming the plan of reorganization should be vacated on the ground that the plan was not fair and equitable; that he should be permitted to object to the claims based on the Caplan mortgage; and that he should be permitted to institute proceedings to recover damages against Abrams and Shaffer as well as for other relief (R. 294–295).

On August 15, 1960, the district court approved the trustee's recommendations, and entered an order which, among other things, vacated and set aside the prior order of March 6, 1959, confirming the earlier plan (R. 324–325). The order stated (R. 325):

> It appears from the Trustee's Report that there are substantial questions regarding the status and validity of the claims of persons who have been accorded participation under the confirmed plan of reorganization. It further appears that the Trustee's investigation disclosed facts not known to the Trustee or to the Court at the time the plan was confirmed, and that such facts in the opinion of the Trustee render the plan not fair and equitable. No rights

> have vested under the existing plan and no creditors or stockholders will be prejudiced by setting the plan aside and permitting the Trustee to submit another one.

The Court of Appeals for the Fifth Circuit unanimously affirmed the order vacating the previous order of confirmation.[*] Relying on this Court's decision in *Pfister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144, 152, the court held that "unless there has been such consummation that a modification would unfairly affect the complaining party he cannot successfully resist a decision by the trial court for good cause shown to withdraw its prior approval" (Pet. App. 9a). The court ruled that "[h]ere no intervening rights had accrued"; that "sufficient showing was made to warrant the court's decision that its earlier order of confirmation was not for the best interests of the parties * * *"; and that "neither the court nor its officer is barred by laches from proceeding with a proper administration of the debtor's affairs" (Pet. App. 10a).

ARGUMENT

The court of appeals held that the district court, at a time when the plan of reorganization had not been consummated and no rights had accrued thereunder, properly had vacated its earlier order of confirmation, because of facts, not known to it when it confirmed the plan but subsequently disclosed, which apparently

[*] The court of appeals also affirmed certain administrative orders of the district court (Pet. App. 10a–11a). No review has been sought of those rulings.

rendered the plan unfair. That holding is correct, is supported by the decisions of this Court, and is not in conflict with the decision of any court of appeals. There is accordingly no occasion for further review.

1. In ruling that judicial approval of a confirmed but unconsummated plan of reorganization may be vacated for good cause, where no intervening rights had accrued, the court of appeals properly applied, to the facts of this case, the settled principle that

> * * * The entire process of rehabilitation, reorganization or liquidation is open to reexamination out of time by the District Court, in its discretion, and subject to intervening rights. [*Pfister* v. *Northern Illinois Finance Corp.*, 317 U.S. 144, 152.]

The reason for the district court's "reexamination" of the plan and the vacation of its order of confirmation was the discovery, through a belated investigation pursuant to Section 167 of the Act, of certain facts which made the plan unfair (see Statement, *supra*, pp. 5–6).[5] Had these facts been uncovered before approval of the plan—as they pre-

[5] There is no basis for petitioners' charge (Pet. 18) that, in vacating the order of confirmation, "the District Court disregarded even the rudimentary requirements of a judicial hearing." On the contrary, prior to vacating the confirmation order the district judge ordered a hearing on the trustee's report of investigation "to consider and determine what action shall be taken in regard to the recommendations made by the trustee in said Report" (R. 296) (which included a recommendation that the order confirming the plan be vacated (R. 294)): notice thereof was sent to all stockholders and creditors (R. 297–298) and the court heard argument of counsel (R. 325). Although the report contains sixty-eight detailed factual allegations (R. 255–294), the answer filed by petitioners on the date

sumably would have been had there been the thorough investigation contemplated by the statute"—it may be assumed that there would have been no approval or confirmation since both of these actions require a determination that the plan be "fair and equitable, and feasible." Sections 174, 221(2). A plan is not fair which permits participation by insiders who have breached their fiduciary obligations to the debtor prior to participation by public security holders whom they have injured. *Taylor* v. *Standard Gas & Electric Co.*, 306 U.S. 307; *Pepper* v. *Litton*, 308 U.S. 295. Furthermore, the basic determinations of fairness and feasibility may be made only on a full record so that there may be an informed estimate as to future earnings. *Consolidated Rock Products Co.* v. *DuBois*, 312 U.S. 510, 524–526; *Securities and Exchange Commission* v. *United States Realty & Improvement Co.*, 310 U.S. 434, 456. No such record had been made when the district judge in this case approved and confirmed the plan.

In view of the trustee's conclusions (see *supra*, pp. 5–6) that there had been "gross mismanagement" which had "wrecked" the debtor's business, and that

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of the hearing did not attempt to refute any of them. It merely stated that the report was "contrary to the evidence in respect of its purported findings and conclusions" (R. 298).

"The importance of such an investigation has been repeatedly emphasized by this Court. See *Securities and Exchange Commission* v. *United States Realty & Improvement Co.*, 310 U.S. 434, 451, 454; *General Stores Corporation* v. *Shlensky*, 350 U.S. 462, 467. See, also, *Committee* v. *Kent*, 143 F. 2d 684, 687 (C.A. 4).

Shaffer and Abrams had profited from illegal sales of the debtor's stock, the district court was fully warranted in concluding that "there are substantial questions regarding the status and validity of the claims of persons who have been accorded participation under the confirmed plan of reorganization" (R. 325). In these circumstances, the court properly vacated its prior order of confirmation, and ordered the trustee to submit a new plan (*ibid.*).

There is no merit to petitioners' contention (Pet. 16–18) that they had vested rights under the confirmed plan that could not be disturbed. The argument rests on the claim that, when the trustee filed with the court his original plan under which the interests which petitioners represented would have obtained control of the debtor, they withdrew a pending appeal from an order directing an investigation into "the validity, amount, and priority" of their claims and refrained from taking other steps by which they allegedly might have defeated the reorganization (Pet. 4, 16–18). But interests under a plan do not vest until consummation. Sections 222 and 229 of the Act contemplate alterations of a plan that may materially affect the interests of participants made after confirmation and prior to substantial consummation, and Section 57k specifically authorizes reconsideration of allowed claims at any time before the estate has been closed.[1] The only cases cited by petitioners holding that rights flowing from a plan of reorganization have

[1] And see *Knight* v. *Wertheim & Co.*, 158 F. 2d 838, 842 (C.A. 2), to the effect that the "order of 'confirmation' is not conclusive."

vested relate to situations where consummation had occurred.[8] Furthermore, even if the fact that petitioners may have given up a strategic position in reliance upon the submission of a plan could be deemed a settlement, it is clear that any settlement or compromise in a Chapter X proceeding, like the plan of reorganization itself, must be based on an "informed, independent judgment," which was wholly lacking here. *Ashbach* v. *Kirtley*, 289 F. 2d 159, 166, (C.A. 8), citing *National Surety Company* v. *Coriell*, 289 U.S. 426, 436.[9]

Since rights had not vested and the proceeding was still continuing, the district court, as a court of equity,[10] could correct its prior mistakes.

2. The decision below is not in conflict with any of the courts of appeals' decisions cited at page 12 of the petition. Both *In re Inland Gas Corporation*, 275 F. 2d 509 (C.A. 6) and *Knight* v. *Wertheim & Co.*, 158 F. 2d 838 (C.A. 2) involved situations where it was alleged that an increase in the value of the debtor's property occurring subsequent to confirmation made the plan unfair. In *Inland* the court characterized the confirmed plan as "sound" (275 F. 2d at 513), and

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[8] See *Hanssen* v. *Wingren*, 121 F. 2d 1011, 1013 (C.A. 10); *In re Burton Coal Co.*, 57 F. Supp. 361, 362, 363 (N.D. Ill.); *Standard Steel Works* v. *American Pipe & Steel Corp.*, 111 F. 2d 1000, 1001, 1002 (C.A. 9).

[9] Cf. also *First National Bank* v. *Flershem*, 290 U.S. 504, 525; *Case* v. *Los Angeles Lumber Products Co.*, 308 U.S. 106, 115; *Consolidated Rock Products Co.* v. *DuBois*, *supra*, 312 U.S. at 520.

[10] See Section 115 of Chapter X. See also *Securities and Exchange Commission* v. *United States Realty & Improvement Co.*, *supra*, 310 U.S. at 455.

in *Knight*, the court noted that "the rise in value of the debtor's property" could not have been foreseen at confirmation (158 F. 2d at 843). In each of those cases, therefore, it was held that the plan as originally confirmed was fair, and the original order of confirmation was proper; the claim was that subsequent events made the plan unfair, and that the order of confirmation should therefore be vacated. In the present case, on the other hand, the original order of confirmation was improper, since if all the material facts in existence at the time of confirmation had been known to the district court, it would not have approved and confirmed the plan as fair. The two other cases are even less applicable.[11]

Nor does the decision below conflict with the cases cited at page 19 of the petition for the proposition that the trustee was estopped or precluded by laches from attacking the confirmed plan of reorganization. *Nichols* v. *Alker*, 231 F. 2d 68, 79 (C.A. 2), was based not upon alleged laches or lack of diligence of those who attacked the plan—indeed, the court's opinion makes clear that they had been continuously attacking the plan—but upon the fact that the challenge to the plan in that case "was brought in violation of the injunction in the reorganization decree," which related to a plan that had already been consummated. The

[11] *Country Life Apartments* v. *Buckley*, 145 F. 2d 935 (C.A. 2), held that a district judge properly refused to permit the filing of an alternative plan at a hearing on confirmation of the trustee's plan. *In re Diversey Building Corporation*, 141 F. 2d 65 (C.A. 7), merely held that a district judge properly denied a motion refusing to permit a plan to be amended which had been consummated almost eight years earlier.

other cases do not involve corporate reorganization proceedings. This Court has pointed out that considerations of the sort urged by petitioners are not to be applied in reorganization proceedings to the detriment of public investors. See *Comstock* v. *Group of Investors*, 335 U.S. 211, 226–228:

> We think that, in the reorganization proceeding, the courts may entertain on their merits objections to a plan even if made by one who might be barred from asserting a cause of action in his own behalf, if the subject-matter of the objections is such that it goes beyond the objector's individual interests and affects the fairness and equity of the plan.
>
> * * * * * *
>
> The court will be diligent to protect itself and the public from approval of unfair plans, even by default, and may take for its own use evidence no party would have a right to force upon it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1961.

APPENDIX

THE BANKRUPTCY ACT

(52 Stat. 840, 11 U.S.C. 1, *et seq.*)

Sec. 167 [11 U.S.C. 567].

The trustee upon his appointment and qualification—

(1) shall, if the judge shall so direct, forthwith investigate the acts, conduct, property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, and any other matter relevant to the proceeding or to the formulation of a plan, and report thereon to the judge;

(2) may, if the judge shall so direct, examine the directors and officers of the debtor and any other witnesses concerning the foregoing matters or any of them;

(3) shall report to the judge any facts ascertained by him pertaining to fraud, misconduct, mismanagement and irregularities, and to any causes of action available to the estate;

* * * * *

(5) shall, at the earliest date practicable, prepare and submit a brief statement of his investigation of the property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, in such form and manner as the judge may direct, to the creditors, stockholders, indenture trustees, the Securities and Exchange Commis-

sion, and such other persons as the judge may designate; and * * *.

Sec. 229 [11 U.S.C. 629].

a. A plan shall be deemed to have been substantially consummated if, insofar as applicable, each of the following events has occurred:

(1) transfer, sale or other disposition of all or substantially all of the property dealt with by the plan pursuant to the provisions of the plan;

(2) assumption of operation of the business and management of all or substantially all of the property dealt with by the plan by the debtor or by the corporation used for the purpose of carrying out the plan; and

(3) commencement of the distribution to creditors and stockholders, affected by the plan, of the cash and securities specified in the plan as provided for in section 224 of this Act.

b. Upon notice to the trustee, the debtor, the Securities and Exchange Commission and such other persons as the judge may designate, the trustee, the debtor in possession, the corporation to which the assets of the debtor are to be transferred under the plan, or any other party in interest may apply to the judge for an order declaring the plan to have been substantially consummated under the provisions of subdivision a of this section.

c. When a plan has been substantially consummated as defined in subdivision a of this section, or an order has been entered under subdivision b of this section, the plan may not thereafter be altered or modified if the proposed alteration or modification materially and adversely affects the participation provided for any class of creditors or stockholders by the plan.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 544/61.

ARTHUR H. SHAFFER and M. JAMES SPITZER, Trustees, *Petitioners*,

vs.

C. GORDON ANDERSON, As Trustee in Reorganization, *Respondent*.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

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ARTHUR H. SHAFFER and M. JAMES SPITZER,
Trustees, *Petitioners*,

vs.

C. GORDON ANDERSON, As Trustee in Reorganization,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

Petitioners' complaint to the Court of Appeals and now to this Court is that they were not permitted by the District Court to consummate a plan of reorganization of the debtor (TMT) which placed the entire control of the debtor in their hands. (138-160)* They were to receive all of the 500,000

*References are to pages of the printed record unless otherwise indicated.

shares of common stock to be issued by the reorganized company and this stock carried all the voting rights. They were to receive, in addition, 250,000 shares of convertible preferred stock and certain other assets. Six of the nine members of the Board of Directors of the reorganized company were to be elected by the common stockholders, so petitioners would be able to control the company. Unsecured creditors with claims in excess of three million dollars were to receive 17 1 2% of their claims in preferred stock to be retired out of a portion of the earnings of the company. Certain maritime lien claimants were to receive some cash and preferred stock.

The crux of this case is why this plan was set aside, and the basic fallacy in the argument of petitioners is that they have been harmed or their rights impaired by the setting aside of the plan and by the District Court's order to the trustee to prepare and submit a new plan of reorganization. The truth is that the petitioners have exactly the same rights that they had when the reorganization proceedings began and have lost none of them during the process of preparing and setting aside the initial plan of reorganization.

Petitioners claim that $330,000 principal debt is due them secured by first preferred ship mortgages covering four vessels of the debtor. This was their claim initially and it is their claim today. Their claim has not yet been liquidated as to validity, amount or priority, such issues being presently pending before a special master appointed by the District Court to consider the same and report to the court, along with similar issues with respect to other lien claims. (Pages 18a-19a, Appendix to Petition for Writ of Certiorari herein).

The initial plan of reorganization which turned the debtor over to petitioners had been approved and confirmed over the strenuous objections of the Securities and

Exchange Commission and of a committee representing stockholders (123, 126, 169, 179), and an appeal by the stockholders from the order confirming the plan was heard by the Court of Appeals along with Petitioners' appeal to that court.

When the trustee and petitioners moved to consummate the initial plan of reorganization (212, 213) the SEC objected, alleging among other reasons the need for an adequate investigation under Sec. 167 of the Bankruptcy Act (216-232). The Court ordered the investigation (245-246) and the trustee filed a complete report of its results (255-295). Among the facts disclosed in this report and which caused the trustee to change his mind about the plan of reorganization and to recommend that it be set aside were:

1. Of some four million shares of TMT stock outstanding with the public, nearly half had been marketed through Arthur H. Shaffer (one of the appellants here) or Joseph Abrams, a stock speculator who, at the time of the investigation, was serving time in Federal prison for defrauding the government. (286)

2. Shaffer and Abrams worked together on many of the stock issues, including the marketing of petitioners' mortgage which was a combination stock issue and mortgage loan. All but one of the original participants in this mortgage were obtained through Shaffer or Abrams. (276) Caplan, the original mortgage trustee, was a front for Shaffer (275), and Abrams was represented among the participants by Bostwick-Westbury Corp., which he controlled (277), and by his uncle, Charles Gordon.

3. Shaffer and Abrams knew at the time they raised the money for the mortgage that TMT was in precarious financial difficulty. (272-273) The loan was made only four weeks before the involuntary reorganization petition

was filed. Therefore, the security demanded was a first preferred mortgage on the ships which were at the time the only source of revenue for the company, and the terms of the loan were harsh—a loan payable in full within 7 months with a $49,500 bonus which amounted to a 15% discount on the face amount of $330,000. (275)

4. Shaffer and Abrams had made large profits from the sale of unregistered TMT stock which they had obtained through their close connection with the management of the company and which they sold to the public although they had obtained all of it under circumstances by which, under the securities laws, it should have been held for investment purposes. (281) In the case of Shaffer, the profits were made by his wife since the transactions were made in her name though arranged by Shaffer. (281)

These were among the facts disclosed by the investigation which led the trustee to conclude that it would not be fair and equitable to turn the debtor over to the mortgage group represented by petitioners and to so recommend to the court.

When the trustee's Report of Investigation came on for hearing, only petitioners opposed the setting aside of the plan of reorganization, although a synopsis of the report, including the recommendations was ordered sent to all creditors and stockholders. (296) It is true, as stated in petitioners' statement of the facts, that all creditors had accepted or acquiesced in the plan of reorganization, so it is significant that only petitioners among the many creditors opposed the formation of a new plan.

Petitioners' main argument is that this initial plan of reorganization constituted a "settlement" of their claim that cannot be set aside. It was no more a "settlement" of petitioners' claim, however, than it was of all creditors'

claims. This is true because *none* of the more than five million dollars in claims had been liquidated prior to the confirmation of this plan of reorganization. The Order Approving the Plan of Reorganization (135) appointed a special master to consider the trustee's objections to claims. (137) All major claims against the debtor were dealt with in the plan and were "settled" *but only for the purposes of such plan.* When the plan was set aside the rights of all creditors as well as stockholders reverted to their former status as claimants, with none of those rights impaired.

No rights were impaired, including those of petitioners, because *no steps whatever had been taken toward consummating the reorganization plan.* No assets had been turned over to the reorganized company; none of the new capital stock had been issued; none of the claimants had been paid in whole or in part; none of the documents executed (or even prepared) which were required to consummate the plan. None of the steps toward consummating the plan had or have been taken as specified in Sec. 229 of the Bankruptcy Act. (Page 16a-17a of Appendix to the Petition herein)

The trustee continues to operate the business of the debtor in a highly successful manner. The latest figures in the printed record show that the total earned surplus under the trusteeship was $576,904.00 as of October 31, 1960 (428), after depreciation, representing less than 3 years operations, for an average of better than $200,000 profit each year. (There are no federal income taxes to pay because of loss carryovers from previous years.) These earnings have been made after paying heavy reorganization expenses not attributable to normal operations. Subsequent to the figures, the record in the District Court shows earnings at even higher rates.

It is the position of the trustee that the rights of none of the interested parties have been impaired by the setting aside of the initial plan of reorganization, that equity and justice require that he be permitted to prepare and present a new plan. If petitioners' claim is as good as alleged, it will have to be accorded appropriate treatment in the new plan, and all of petitioners' rights will have to be protected in the manner required by law.

ARGUMENT.

It is the position of respondent that there exist no special or important reasons for review by this Court of the decision of the Court of Appeals, that petitioners have had a complete review of the alleged errors of the District Court, that the opinion of the Court of Appeals is an equitable and proper one which requires no review by this Court, that the reorganization proceedings involving TMT are still pending in the District Court with no rights of petitioners impaired, and that any further review by this Court at this time is premature.

We will answer, in order, each of the five reasons advanced by opposing counsel as to why the writ of certiorari should be allowed.

1. There Is No Conflict with Decisions in Other Circuits Regarding the Power to Set Aside a Confirmed but Unconsummated Plan of Reorganization under Sec. 229 of the Bankruptcy Act.

In re Inland Gas Corporation, 275 F.2d 509 (Sixth Circuit, 1960), involved post-confirmation proposals for alteration and modification of the plan proffered under Section 222 of the Bankruptcy Act which vests a certain amount of discretion in the District Court and has been

construed to impose certain standards on such proposals in terms of "congruency" with the confirmed Plan, "material" change of circumstances, etc. In *Inland*, the District Judge exercised his discretion against the new proposals and he and the majority of the Court of Appeals held that those standards had not been met.

In the TMT case, the District Judge did not set aside the confirmed Plan because of proposed *modifications* or *alterations* under Section 222—he scrapped the entirety of the confirmed Plan in an exercise of his inherent equitable power sitting in bankruptcy. The old Plan had been approved, accepted by creditors and confirmed on the basis of inadequate knowledge and in the face of a failure to comply with required statutory procedures. *Inland* has nothing to do with Sec. 229 of the Bankruptcy Act.

Likewise, *Knight* v. *Wertheim & Co.*, 158 F.2d 838 (Second Circuit, 1946), refers only to procedure under Secs. 222 and 223 and not to the setting aside of an entire plan and the formation of a new one.

Country Life Apartments v. *Buckley*, 145 F.2d 935 (Second Circuit, 1944), involved consideration of a pending plan of reorganization and whether it should be materially modified. It did not concern the complete setting aside of the pending plan and the proposed formation of another for the benefit of all interested parties.

In re Diversity Bldg. Corporation, 141 F.2d 65 (Seventh Circuit, 1944), was an attempt to modify a plan of reorganization almost eight years after it had been confirmed and in operation under the court's supervision.

Rights in a confirmed plan "vest" only when it is "substantially consummated" and Sec. 229 sets forth when "substantial consummation" shall be deemed to have taken place. Section 229 expressly precludes material alteration

or modification under Sec. 222 after substantial consummation (as a matter of legislative history, Section 229 is interrelated with Section 222) and its relevance to this case is the inference that, if a plan can be materially altered or modified prior to substantial consummation, *a fortiori*, it can be set aside under circumstances which normally permit a District Court to vacate a non-final order.

None of the cases cited by petitioners limit, or imply any limitation on, the general power of the court to revise non-final orders on the basis of newly discovered evidence or mistake.

2. There Is No Conflict with Other Decisions by the Holding Below That There Can Be No Compromise Settlement of a Claim until After Substantial Consummation of a Plan of Reorganization.

Three cases are cited for the second reason relied on by petitioner for allowance of the writ. The last two are not in point and do not involve an approved plan of reorganization. *Hanssen* v. *Winogren*, 121 F.2d 1011 (Tenth Circuit, 1941), involved a plan of reorganization *which had been consummated in part* so that creditors' rights had become vested and not subject to change.

3. There Is No Conflict in the Decision Below with Decisions of This Court.

Petitioners' argument under their third point is based on the false assumption that they lost some vested rights when the plan of reorganization was set aside. The record shows clearly, as the Court of Appeals found, that no steps whatever had been taken toward consummating the plan. Therefore no intervening rights had accrued. Petitioners have today every right they had at the begin-

ning of the reorganization proceedings. They can acquire no vested rights in any plan of reorganization until some steps have been taken toward consummation.

> "The entire process of rehabilitation, reorganization or liquidation is open to re-examination out of time by the District Court, in its discretion, and subject to intervening rights." *Pfister* v. *Northern Illinois Finance Corp.* 317 U.S. 144, 152.

4. The District Court's Order Vacating the Plain of Reorganization Was Entered After Hearing on Notice to All Parties in Interest.

The Trustee's Report of Investigation was filed July 1, 1960 (255), and the court ordered a hearing to be held on July 14th "to consider and determine what action shall be taken in regard to the recommendations made by the trustee in said report" and a synopsis of the report including the recommendations was ordered sent to all creditors and stockholders. (296) The Trustee notified all creditors and stockholders of the hearing, sent them the synopsis of the Trustee's Report, the court's order for the hearing. The notice as well as the court order stated that the purpose of the hearing was to consider what action should be taken on the Trustee's Report.

The hearing on July 14, 1960, was attended by representatives of all major creditors, the Stockholders Committee, the SEC and the Department of Justice representing the United States as a creditor.

Counsel for petitioners opposed the Trustee's recommendations but their reasons were based solely on certain legal conclusions of the Trustee with respect to the evidence outlined in the Trustee's Report; they did not point out any particular instance wherein the Trustee was not accurate with respect to the facts disclosed by the

investigation and mentioned in the Report. (298-304) This answer only controverts the legal sufficiency of the facts to justify the recommendations made.

Petitioners were the only parties to oppose the trustee's recommendations, and under these circumstances the District Court entered its Preliminary Order (307) and later its final order adopting the trustee's recommendations. (324) Both the District Court and the Appellate Court found that there was good cause shown for the action taken.

Again we emphasize that petitioners' rights as a creditor have not been impaired, that a new plan of reorganization will be prepared that must accord all parties proper consideration of their rights. Petitioners' claim is but a small portion of the total claims involved, and all other parties expressly consented to or acquiesced in the decision that a new plan of reorganization should be prepared.

5. The Decision Below with Respect to Alleged Laches and Estoppel Is Proper and Does Not Conflict with Other Circuit Decisions.

The four cases cited by petitioners in support of their fifth reason why the writ should be allowed do not pertain to situations comparable to the case at bar. The first two relate to compromises of claims that had been carried out in part and in which the claimant could not be restored to his former position. *In re Universal Rubber Products* Co., 25 F.2d 168, involved an effort to recover a sum that had already been paid to a claimant pursuant to an order fixing the amount due. *Nichols* v. *Alker*, 231 F.2d 68, was an effort to attack collaterally a plan of reorganization 18 months after its consummation.

CONCLUSION.

This cause is pending before the District Court on order to the trustee to prepare and submit a new plan of reorganization. Petitioners acquired no vested rights in the initial plan because it was set aside before any steps toward consummation had been taken; so no substantial rights of petitioners have been impaired.

There exist no special or important reasons for another review by this court of the decision of the District Court.

The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

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Dated December 11, 1961.

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IN THE

Supreme Court of the United States

OCTOBER TERM—1961

No. 544

ARTHUR H. SHAFFER and M. JAMES SPITZER,
Trustees,
Petitioners,

versus

C. GORDON ANDERSON, as Trustee in
Reorganization,
Respondent.

REPLY BRIEF FOR PETITIONERS (IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI)

M. JAMES SPITZER,
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of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 544

ARTHUR H. SHAFFER and M. JAMES SPITZER, Trustees,

Petitioners,

v.

C. GORDON ANDERSON, as Trustee in Reorganization,

Respondent.

REPLY BRIEF FOR PETITIONERS

I

Respondents have constructed their position on a non-existent foundation; there is no adjudication by the District Court, nor any competent evidence of record to warrant an adjudication, that the trustee's investigation report is correct in any respect or that the plan is unfair or inequitable.

The opposing briefs are premised upon the same erroneous hypothesis, that is, that the trustee's investigation report "disclosed" and "established" "facts" that "rendered the plan unfair", permitting confirmation to be vacated "in an exercise of (the Court's) inherent equitable power sitting in bankruptcy". These are self-adjudicated

conclusions of respondents, not of the District Court. The briefs do not challenge, nor could they, that:

> none of the so-called "facts" was ever determined to be a fact by the District Court;
>
> no hearings in a judicial sense were ever conducted by the District Court to ascertain whether or not the allegations are facts; no trial was held, no testimony was adduced, no evidence was presented, not even the inadmissible material on which the trustee's report is purportedly based;
>
> when the District Court vacated confirmation of the plan it had never read nor even seen the material on which the trustee's report is supposed to be based, the bulk of which was not on file months after the Court acted;
>
> the District Court explicitly disclaimed that "anything" adverse to petitioners had been found or concluded;
>
> the District Court has not held the plan to be unfair or inequitable, or anything more than that the Trustee's report discloses facts that "*in the opinion of the Trustee* render the plan not fair and equitable";
>
> of record, undisturbed, is an order of the District Court vacating a prior order (that authorized the filing and referral to a Special Master of objections to petitioners' claim), for the expressed reason that "the matters which were to be resolved by the Special Master were amicably resolved" (pet. for cert., pp. 5-8).

The trustee and the SEC, in an effort to blunt the impact of these incontrovertible facts, urge—quite erroneously—that petitioners did not oppose the substance of the investigation report, but only the legal sufficiency of the facts to justify the recommendations (tr. br., pp. 9-10; SEC br., pp. 8-9). The report not being a pleading, re-

quired no answer, but petitioners, in order to make their position unmistakably clear, responded separately, to the trustee's applications for the preliminary and final orders of revocation (298-304, 317-322). In addition to raising all the defenses recited in the petition for certiorari (p. 6), the answers challenged the legal sufficiency of the report (304), and also attacked it as "contrary to the evidence" (298), and "disput(ed) the correctness of all conclusions and conclusory statements and a substantial portion of the purported factual statements * * * insofar as they bear upon the Caplan mortgages" (302). None of the issues were tried.

Hence it follows that the holding of the Court of Appeals and the argument of respondents that a confirmed plan, not substantially consummated, may be vacated "for good cause shown" are without application herein. The District Court neither found, nor had competent evidence before it on which to adjudicate, that there was good cause or any other cause to vacate confirmation of the plan.

II

The issue is whether § 229 authorizes, at any time prior to substantial consummation, revocation of a confirmed plan of reorganization and repudiation of a settlement fully performed by one party. On this point, which has wide application in reorganization proceedings, the Court below is in conflict with other Circuits.

Respondents do not recognize that involved herein is both the vacating of a confirmed plan of reorganization as well as the repudiating of a compromise settlement, which the trustee and the Court induced petitioners fully to perform. The position of respondents parallels the holding of the Court below that under § 229 there are no recogniz-

able rights or equities in respect of either the settlement or the plan until the latter has been substantially consummated.

That concept has been analyzed in the petition for certiorari (pp. 9-19).

As shown above, the District Court could not in the present posture of this case have properly exercised equity power, if it had any, and accordingly the Court of Appeals found it necessary to alter § 229 from its legislative purpose of establishing a bar time, into an authorization to vacate a confirmed plan of reorganization and divest established rights. The trustee's brief echoes that position, which is in direct conflict with *Inland, Knight, et al.*

The trustee inaccurately argues that "*Inland* has nothing to do with Sec. 229" (p. 7). The essence of the SEC brief therein (in support of the petition for certiorari), was specifically that § 229, in conjunction with § 222, authorized a material modification of a confirmed plan and that a more compelling case for the exercise of such power would be difficult to visualize. The petition was denied. By coincidence, counsel for Allied Assets Corp. herein below also appeared for respondent in *Inland*, stating there that the main contention of petitioners therein derived from § 229 and argued that it did not authorize a material post-confirmation modification tantamount to a new plan; prudently, to avoid a conflicting stand, Allied Assets Corp.'s counsel filed no opposing brief herein.

Pfister v. *Finance Corp.*, 317 U. S. 144, relied on by the SEC (p. 8) and cited in the petition for certiorari (p. 16) holds that the right of bankruptcy courts to affect prior orders is "subject to intervening rights" (p. 152).

Respondents justify the trustee's "change (of) mind" (tr. br., p. 3) on the inapplicable theory of newly discovered evidence. They studiously ignore that all material now alluded to was previously available and specifically

brought to their attention (pet. for cert., pp. 7-8). § 57k (cited by SEC, p. 10) as well as the concept of reconsideration for newly discovered evidence are unavailable if the means of obtaining the evidence were previously in the possession of applicant or available to him through the exercise of diligence.[1]

III

Petitioners have been irreparably prejudiced.

The trustee repeatedly argues that respondents have not been adversely affected (pp. 2, 6, 10).

The facts are that petitioners have lost and cannot be restored to the position occupied when induced by the trustee to discontinue their appeal, which, if prosecuted, might have resulted in petitioners obtaining possession of the vessels or the proceeds of sale. That there was a reasonable likelihood of such result, was in effect attested to by the trustee, who swore that he and his counsel invited petitioners to a conference and proposed the very plan of reorganization that he now criticizes, "for the purpose of persuading (petitioners) not to prosecute an appeal" (appendix to Allied Assets Corp., br. below, pp. 16M, 20M). In contrast to what would or might have been, petitioners have collected nothing, and have been subjected to great and continuing expense. Furthermore, one of the four mortgaged vessels was then under lucrative charter, which has been permitted to terminate, and the trustee has sold the ship; another vessel was severely damaged and sold for salvage, with the funds collected by the trustee, etc. (Appendix below, pp. 3a-5a, 9a-12a, 14a; 29, 371-378).

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[1] *In Re El Dorado Ice & Coal Co.*, 280 Fed. 180, 181; *Nichols v. Alker*, 231 F. 2d 208 cert. den. 352 U. S. 829; *In Re Shell Metal Products, Inc.*, 19 F. Supp. 785; *State Central Savings Bank v. Hemmy*, 77 F. 2d 458, 459; *Remington, Bankruptcy*, vol. 2, § 1038, p. 492; § 1038.50, p. 493; *U. S. v. Branson*, 142 F. 2d 232.

CONCLUSION

The petition for writ of certiorari should be allowed.

Dated: December 19, 1961.

Respectfully submitted,

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